United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

77-1006

To be argued by
JOHN L. CADEN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1006

UNITED STATES OF AMERICA,
Appellee,

—*against*—

RAYMOND GRABER,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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Preliminary Statement

Raymond Graber appeals from a judgment entered in the United States District Court for the Eastern District of New York (John F. Dooling, Jr., *J.*) on December 10, 1976, which convicted him, following a bench trial, of a single count of perjury before a federal grand jury, in violation of 18 U.S.C. § 1623(a). The imposition of sentence was suspended, and appellant was placed on probation for a period of three years. Appellant was also fined $1,000 dollars.

On appeal, Graber makes three claims; *first*, that, as a matter of law, his grand jury testimony was not perjurious; *second*, that he was inadequately represented by counsel; and *third*, that he did not voluntarily waive his right to a jury trial.

Statement of Facts

1. The Grand Jury Investigation

In January of 1975, pursuant to Rule 6 of the Federal Rules of Criminal Procedure, the United States Attorney for the Eastern District of New York commenced a grand jury investigation in order to ascertain first, whether there existed in the Town of Hempstead, Nassau County, a system under which town employees were expected to contribute one percent of their annual wages to the Town of Hempstead Republican Finance Committee, and secondly, if such a system existed, whether such political contributions were made voluntarily or otherwise. The grand jury also sought to determine whether any violations of federal law were involved; specifically, the Civil Rights Act, 18 U.S.C. §§ 241 and 242, and the Hobbs Act, 18 U.S.C. § 1951.

The grand jury investigation lasted approximately eighteen months. During that time, over three hundred Town of Hempstead employees testified concerning their knowledge of the so-called "one percent system," including a number of employees from the Department of Conservation and Waterways. In substance, the witnesses testified that appellant (formerly the Administrative Assistant and later the Deputy Commissioner of the Department of Conservation and Waterways) solicited, collected and forwarded their one percent contributions to the Town of Hempstead Republican Finance Committee every year from 1968 through 1974 (63-74).[1]

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[1] References preceded by the letter "A" are to pages of Appellant's Appendix. Unless otherwise indicated, all other references are to pages of the trial transcript.

Based upon this testimony, appellant was subpoenaed to testify before the grand jury.

2. Appellant's Grand Jury Appearance

On July 11, 1975, appellant appeared and testified before the federal grand jury. Before he testified, appellant was informed by Assistant United States Attorney James Druker of the scope of the grand jury investigation and of the general nature of the testimony of employees within his department. After being advised of his constitutional rights, appellant expressed a desire to testify. He told the grand jury that all he knew about the "one percent system" was what he read in the papers. Further, he stated that since 1966, his role within the Department of Conservation and Waterways had been to transmit, but not to solicit, employee contributions to the Republican Finance Committee. Lastly, appellant testified that at the request of the employees he prepared 3 x 5 cards in order that they could compute the one percent. According to appellant, the only information contained on these cards was the employee's name and annual salary. He maintained that the cards did not have the one percent figure computed on their face (A. 394a-401a).

On March 5, 1976, appellant was indicted for perjury. The indictment charged that appellant lied to the grand jury when he denied that he either approached or solicited Town employees into making one percent contributions to the Republican Finance Committee (A. 4a-8a).[2]

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[2] Set forth below are appellant's answers in the grand jury as they appeared in the indictment.

"Q. All right. Now, did you play any role within your department in actively soliciting these contributions from employees under you at any time?

[Footnote continued on following page]

A. Okay. I don't want to be hairy about it. * * * In 1966 when I made my contribution, everybody gave their contributions to then Director, now Commissioner, Udell. * * * The following year Commissioner Udell, his current title, said to me, 'Ray, I'm pretty well tied up. As you know I am also teaching at Suffolk Community College. I would like you to transmit—this is the point I am making—transmit campaign contributions.' And people—then some of them did give them to him and he gave them to me and as I understand, we did have a few facilities in the hinterland. You will find that in August of September in all of these various facilities, people will say, 'Is now the time to contribute?' So he advised them, give it to me. All right? Each and every ensuing year, I was the transmitter. * * * Now, I'll break down and get direct to it. I would never be so presumptuous just as I have at times in my community rang doorbells, I would never be so presumptuous in the community even if I knew a man was—to say, 'You ought to give five dollars or ten dollars.' Neither would I be so presumptuous to say to anybody that, 'You should give one percent.' Additionally, as one example, and I can give you many, sir, when my own secretary came [to me] * * * she said, 'Mr. Graber, what is everybody talking about? What is one percent?' And I said, 'Vicky, you have to get that information from somebody else.' In other words, feeling in my position, that I should not be the originator of such a thing.

* * * * *

Q. A number of employees have testified that you would come around and give them a three-by-five or a similar card on which it would have their name, their salary, and a handwritten notation somewhere on the card which was a figure representing one percent of their salary. Now, first of all, has that occurred?

A. No, not in the manner and the way that you said it.

Q. All right. Would you relate your recollection?

A. We're talking about 1966, you know, since this is only '75 through '74. I have previously stated that comes August or September and 95% to 98% of the department I am with, employees are in hinterland buildings scattered all over. I rarely see them. I have no direct communication with them. I have never solicited them. Okay? But as

[Footnote continued on following page]

3. The Government's Evidence At Trial[3]

The Government's evidence established that in the fall of every year between 1968 through 1974, appellant reminded employees of the Department of Conservation and Waterways that it was time to pay their one percent political contributions to the Republican Finance Committee. The testimony was that appellant personally

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August and September come around, individuals and supervisors start calling up or coming in and believe it or not, sir, many of them although they know if they've had overtime and their check is not correct, do not know their annual salary. If somebody asks for their annual salary, they will get it.

Q. All right. And then you write it down?

A. If somebody will ask either in person or by phone, 'Will you figure out one percent for me?', he has to take the initiative or in some cases it is his supervisor who will come in and say, 'John, Bill and Joe all want to know what they make,' or 'John and Bill want to know what they make and Joe wants to know what one percent is.' I will have one of the girls write it out for them. Okay?

Q. And then do you give it to them?

A. I have given it to individuals and in some cases to their supervisors when they took the initiative and asked me for it.

* * * * *

Q. So from the standpoint of what you've just said, she [Dorothy Hederick] would prepare the card for everyone in the department and then hold them so that they would be available if the individual requested it.

A. Yes. But by somewhere along the way, we have received so many phone calls or so many requests, that I did give some to some supervisors with these instructions, so help me God! 'You have this. You've been asking for it for some. There's gonna be more. I'm too busy preparing a budget. They are only to be given to a man if he asks you a question which specifically can be answered by you.' And there was no one percent figure on those cards."

[3] At the trial below, Judge Dooling made detailed findings of facts which are set forth in his opinion and included in the Appellant's Appendix at pages 392a-418a.

approached, solicited and collected the one percent from employees who worked in the Department's main office at Point Lookout (A. 402a).[4]

In addition, appellant instructed supervisory personnel to solicit the employees under them to make their one percent contributions (A. 402a). Appellant gave the supervisors lists of the employees in their locations with their annual salaries, and employees who worked outside the main office and who failed to make their one percent contributions were told to take the matter up with appellant (A. 402a).

The evidence also established that appellant prepared 3 x 5 cards, on his own initiative, to solicit and collect the one percent. Each card had on it the name of an employee and his annual salary. And in one year, 1973, each card contained the one percent amount computed on its face. However, Hempstead Town employees neither asked appellant for the lists nor for the cards in order to make their one percent contributions. Furthermore, when necessary, appellant did not hesitate to take steps to enforce the one percent sysem. On one occasion, he called a supervisor in the Department and instructed him to remove an employee from overtime because the employee had not paid his one percent (309-323).[5] Similarly, appellant told another employee, Frank Guma, that if Guma wanted a better paying job, he would be expected to pay his one percent. Guma paid his one percent to appellant, and a short time thereafter he received the desired job (363-371). Finally, when Pauline Krannick showed her op-

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[4] At trial, the following employees testified that appellant personally solicited them for the one percent: Yolanda Speranza (118-120), Thomas Doheny (144-145), Mary Powers (173-177) and Frank Guma (363-371).

[5] The supervisor informed Commissioner Udell, who countermanded appellant's order and restored the employee to overtime (309-323).

position to paying the one percent by drawing a check for an amount equal to exactly one percent of her annual salary—$81.67, appellant returned the check to her and told her to prepare a new check rounded off to the nearest dollar. Krannick did as she was told and later gave appellant a check for $82.00 dollars (395-402).

4. The Defense Case and the Government's Rebuttal

Appellant took the witness stand in his own defense. He testified that a "Watergate like" cover-up was being perpetrated in the Department of Conservation and Waterways by Commissioner Udell and that he (appellant) was being set up to take the blame for the one percent scheme (511). Further, he indicated that he was under great emotional stress when he appeared before the grand jury and that he had not been afforded an opportunity to testify fully and completely. He said that the prosecutor had treated him harshly and had continually interrupted him. Appellant maintained that he suffered from World War II injuries which had caused him to be unable to think clearly under the extreme stress of the grand jury. Finally, Graber stated that he did not lie when he appeared before the grand jury (465-527).

On cross-examination, appellant denied telling FBI Agent Walter Distler, that he did not solicit political contributions from his fellow workers (528-564).

In rebuttal, FBI Agent Walter Distler testified that twice during the course of an interview on June 11, 1975, a month prior to appellant's grand jury appearance, appellant denied soliciting departmental employees for political contributions (576-581).

5. The District Court's Findings

At the conclusion of the trial, Judge Dooling, in his Memorandum of Decision, made, in part, the following findings of fact (A. 401a-402a):

> "The Government's evidence at the trial established beyond a reasonable doubt that the defendant both had solicited, on behalf of the Town of Hempstead Republican Finance Committee, contributions equal to one percent of annual compensation and had suggested to Town of Hempstead employees that they give one percent of their annual compensation to the Republican Finance Committee of the Town of Hempstead. The evidence of the witnesses was that in August or September of each recent year before 1975 the defendant would remind them that one percent time was at hand, and that he would do this without being asked by employees whether or not they were expected to contribute or whether or not it was time to make a contribution to the Republican Finance Committee."

Based on the above factual findings, the court concluded that appellant testified falsely when he appeared before the grand jury and stated that he was merely a transmitter for employee contributions to the Republican Finance Committee. Hence, the court found appellant guilty of perjury as charged in the indictment (A. 418a).

ARGUMENT

POINT I

Appellant Committed Perjury When He Testified Before The Grand Jury.

Relying on *Bronston* v. *United States*, 409 U.S. 352 (1973), appellant contends that the answers which he gave in the grand jury were so unresponsive and inexact that they could not form the basis of a perjury indictment under Title 18 U.S.C. § 1623.[6] We respectfully submit that the contention is without merit.

In *Bronston*, the defendant was convicted of perjury in a bankruptcy proceeding.[7] The conviction was based upon the following colloquy between the defendant and a lawyer for a creditor of *Bronston Production, Inc.*, the company of which defendant Bronston was the owner:

> "Q. Do you have any bank accounts in Swiss banks, Mr. Bronston?
>
> "A. No, sir.
>
> "Q. Have you ever?
>
> "A. The company had an account there for about six months, in Zurich.
>
> "Q. Have you any nominees who have bank accounts in Swiss banks?

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[6] 18 U.S.C. § 1623(a) provides in part:

> Whoever under oath in any proceeding before . . . any . . . grand jury of the United States knowingly makes any false material declaration . . . shall be fined [and/or imprisoned]

[7] The prosecution in *Bronston* was brought under 18 U.S.C. § 1621, the predecessor to 18 U.S.C. § 1623.

"A. No, sir.

"Q. Have you ever?

"A. No, sir."

The evidence established that for nearly five years Bronston had a personal bank account at a Swiss bank. The government tried and convicted Bronston on the theory that he gave an unresponsive answer to the second question by referring to the company's assets instead of his own in order to mislead the questioner with the implication that he (Bronston) had no personal Swiss Bank account. Following the affirmance of his conviction by a divided panel of this Court (453 F.2d 255) Bronston petitioned for, and there was granted, a writ of certiorari.

After stating that the question to be decided was "whether a witness may be convicted of perjury for an answer, under oath, that is literally true but not responsive to the question asked and arguably misleading by negative implication," the Supreme Court (Chief Justice Burger) reversed Bronston's conviction. The Court concluded that Bronston's response to the second question above did not constitute perjury. Rejecting the government's efforts to have the perjury statute construed broadly to punish literally true but unresponsive statements which are given to mislead, the Chief Justice noted that "if a witness evades, it is the lawyer's responsibility to recognize the evasion and to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination." [8] Thus, ". . . any special problems arising from the literally true but unresponsive answer are to be remedied through the 'quesioner's acuity' and not by a federal perjury prosecution." [9]

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[8] 409 U.S. at 358-59.

[9] Id. at 362.

Appellant's reliance on Bronston is misplaced. Unlike Bronston, appellant's answers to the questions quoted in the indictment were both responsive and untruthful. Specifically, appellant was asked if he solicited one percent contributions from employees within his department. Appellant's answer, in substance was that he did not solicit these contributions but that after 1966 he merely "transmitted" such contributions to the Republican Finance Committee. Furthermore in his answer, appellant said that he would not have been so presumptuous as to tell anyone "you should give one percent." Similarly, when asked if he had distributed 3x5 cards to employees which contained the employee's name, annual salary and one percent figure computed on its face, Graber replied that he had not, because, as he explained, he prepared such cards without a one percent figure on them and distributed the cards only to those employees who requested information as to what their annual salary was. Appellant also said that he gave these 3x5 cards to supervisors with the instruction that they not be disseminated to employees who did not request information concerning their annual salary.

Thus, although appellant's answers were rambling and verbose, they nevertheless constituted, in their entirety, definite and responsive negative replies to the questions posed. See *United States* v. *Bonacorsa*, 528 F.2d 1218 (2d Cir. 1976) at 1456. Clearly, the crime of perjury was committed. As Judge Dooling aptly observed in his opinion (A. 417a):[10]

> "In the present case, in contrast [to *Bronston*], the defendant's answers while discursive and cir-

[10] Also to be rejected, we submit, appellant's contention that the questions which produced his responses were "ambiguous and vague" (Appellant's Brief page 41). Indeed, a plain reading of the indictment (A4a-8a) refutes the claim.

cumstantial, were precisely responsive. They depicted his role; they conveyed very complete answers to the questions. The answers he gave could not have been deprived of their content as responsive and untrue by any words that the defendant could have added to them short of total and explicit recantation before the Grand Jury of the substance of the answers given."

POINT II

Appellant Was Skillfully Represented By Counsel At His Trial.

Appellant contends that John Sutter, the attorney who represented him at trial, was incompetent and that he (appellant) was thus deprived of his Sixth Amendment right to assistance of counsel. Specifically, Graber claims that Sutter was incompetent because he allegedly (1) refused to meet with him, (2) failed to subpoena witnesses, (3) caused his arrest,[11] and (4) demeaned him in front of Judge Dooling.

Appellant concedes at the outset that in this Circuit the standard for determining whether counsel was inadequate was enunciated in *United States* v. *Wight*, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950). "[U]nless the purported representation by counsel was such as to make the trial a farce and a mockery of justice, mere allegations of incompetency or inefficiency of counsel will not ordinarily suffice as grounds for the issuance of a writ of habeas corpus. . . . A lack of effective assistance of counsel must be of such a kind as to shock the conscience of the Court and make the proceed-

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[11] Appellant was arrested at his home on September 1, 1976 when he failed to appear for trial in Brooklyn on August 31, 1976.

ings a farce and mockery of justice." Moreover, this standard has been reaffirmed "numerous times in recent years." *Rickenbacker* v. *The Warden, Auburn Correctional Facility*, — F.2d —, Slip op. 1063, 1070 (2d Cir. 1976); *Lunz* v. *Henderson*, 533 F.2d 1322, 1327 (2d Cir. 1976); *United States* v. *Yanishefsky*, 500 F.2d 1327, 1333 (2d Cir. 1974); *United States ex rel. Walker* v. *Henderson*, 492 F.2d 1311, 1312 (2d Cir.), *cert. denied*, 417 U.S. 972 (1974); *United States* v. *Sanchez*, 483 F.2d 1052 (2d Cir. 1973), *cert. denied*, 415 U.S. 991 (1974); *United States ex rel. Marcelin* v. *Mancusi*, 462 F.2d 36, 42 (2d Cir. 1972), *cert. denied*, 410 U.S. 917 (1973); *United States ex rel. Scott* v. *Mancusi*, 429 F.2d 104, 109 (2d Cir.), *cert. denied*, 402 U.S. 909 (1971); *United States* v. *Katz*, 425 F.2d 928, 930-31 (2d Cir. 1970).

Nevertheless, appellant urges the Court to reject the "farce and mockery" standard and to reverse his conviction by following the test enunciated by the District of Columbia Circuit, which is whether the defendant had "reasonably competent assistance of an attorney acting as his diligent conscientious advocate." *United States* v. *De Coster*, 487 F.2d 1197, 1202 (D.C. Cir. 1973).

For our part, we have no difficulty in responding to appellant's argument. We recognize that Judge Smith stated in *Rickenbacker* v. *The Warden, Auburn Correctional Facility, supra*, that perhaps the *Wight* standard should be reconsidered, *Rickenbacker* v. *The Warden, Auburn Correctional Facility, supra*, Slip Op. at 1071. We submit, however, that in this case that issue need not be decided, for we believe that the record shows that the performance of Graber's attorney meets any standard which has been suggested, whether it be that of *Wight*, *De Coster* or one of the tests employed in the other circuits. See *Rickenbacker* v. *The Warden, Auburn Correctional Facility, supra*, Slip Op. at 1071.

Prior to trial, Mr. Sutter requested and received from the Government an opportunity to review all the information which was developed during the course of the investigation. This included, among other things: (1) questionnaires sent by the United States Attorney's Office to hundreds of employees of the Town of Hempstead concerning their knowledge of the one percent system; (2) the grand jury testimony of all Department of Conservation and Waterways employees and (3) and all FBI 302's—reports of interviews which were conducted by that agency with regard to employees in appellant's department. In addition, prior to trial, Sutter requested and received copies of all materials discoverable under Rule 16 of the Federal Rules of Criminal Procedure and 18 U.S.C. § 3500, as well as copies of all of the Government's trial exhibits. Mr. Sutter also sought, but the Government refused to turn over, an internal prosecution memorandum from Assistant United States Attorney Druker to United States Attorney David G. Trager (85-90). Also prior to trial, Sutter moved to dismiss the indictment on the grounds that appellant's testimony at the grand jury, not excluding the parts quoted in the indictment, did not show the falsity charged in the indictment. Judge Dooling stated that he would reserve his ruling on the motion until the close of the prosecution's case (56-62).

Moreover, at all times during the trial Sutter advanced a rational and consistent theory of the case in appellant's defense. Sutter sought to show first that appellant's statements in the grand jury were not responsive answers and that they could not as a matter of law be the foundation of a perjury indictment (56-62; 587-591). Second, Sutter sought to portray appellant, both at the grand jury and at trial, as a man suffering from both a mental and emotional condition which impaired his ability to testify clearly and thoughtfully (465-527a).

During the course of the trial, Mr. Sutter vigorously cross-examined every Government witness,[12] and he repeatedly asked for and obtained from the court recesses so that he could confer with his client prior to cross-examination (150; 292; 402). On cross-examination, Sutter sought to show that appellant never threatened, forced, or even counseled any employee that he or she had to pay the one percent (A. 478a). Sutter's cross-examination also sought to show that appellant never suggested to any employee that if he or she did not pay the one percent, they would lose their job, or not get a promotion (A. 478a). Additionally, Sutter repeatedly sought, whenever the opportunity presented itself, to impeach a witness by showing a witness's bias or motive to testify against appellant (A. 478a).

At the conclusion of the Government's case, Mr. Sutter made a very thorough and detailed motion under Rule 29 of the Federal Rules of Criminal Procedure for a judgment of acquittal. Among other things, he argued the *Bronston* issue, which is one of the points raised on this appeal. He also contended that the testimony sought to be elicited from appellant at the grand jury was not material to its inquiry. Sutter further argued that the grand jury was not validly convened and that there was no proof that the grand jury foreman validly administered the oath to appellant. In short, Sutter left no stone uncovered in his efforts to obtain appellant's acquittal at the conclusion of the Government's case (413-462a).

After Judge Dooling denied the motion, Sutter requested and obtained an adjournment of the trial until the following day, Tuesday, September 14th. The court

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[12] See, for example, the cross-examinations of Yolanda Speranza (122-138), Thomas Doheny (150-170) and Frank Guma (372-376).

granted the recess because appellant and Sutter desired another day to discuss the presentation of the defense case. Mr. Sutter stressed to the court that it was his obligation to confer with appellant to see what other things appellant wanted to be done before going forward with the defense case (458-462a).

On Tuesday morning, September 14th, the defense called one witness—appellant. After Sutter had completed his direct examination, he asked the court to adjourn for lunch, prior to cross-examination, so that he could confer with appellant one more time to assure himself that appellant wished nothing further to be done in the defense case (526).

Finally, Sutter made a closing statement. Among other things, he urged the court to acquit appellant on the grounds that it was clear from the grand jury transcript that appellant was never afforded an opportunity to complete his answers because of the prosecutor's interruptions. He further argued that appellant, who allegedly suffered from a severe emotional disability at the time, did not intend to, nor did he in fact, give false answers when he testified before the grand jury (587-591).

The fact that appellant was represented at his trial in a manner different from the way in which his appellate attorney would have tried the case is not a ground for setting aside the judgment of conviction. More fundamentally, there is absolutely no basis for concluding that Sutter's representation of appellant in any way even approaches what could be called, by any standard, ineffective or inadequate assistance of counsel. Indeed, Judge Dooling himself found that Sutter effectively represented his client (A. 478a-481):

> "And I think that within the four corners of the kind of trial that Mr. Sutter was determined

to conduct and did conduct, he represented Mr. Graber very effectively. . .

> Now, I do not think that he [Graber] was ineffectively represented. I think that he [Graber] kept believing throughout that it would have been better to call a lot of witnesses who would have, in effect, tried to change the atmosphere that arose of the Government calling the selected witnesses that it did. Because it was no secret to me that out of, I think, literally, hundreds who had been interviewed—and many more who had been interviewed in Mr. Graber's department than were called as witnesses, that the Government didn't have as many witnesses as there were people in Mr. Graber's department. Perfectly plain. But that, you see, would have been highly relevant to a different case. The case before me was this very much narrower case and one in which I think the principle objects of the trial had to be—first, to see that the witnesses didin't over speak, to get out of them what background support of decency and decorum could be obtained, to impeach credibility for what it was worth where it could be done, and most important, to—if he was up to it—and he was—have Mr. Graber testify as to the circumstances of the Grand Jury testimony, his own background kind of person he was and his personal feelings with respect to what went on in the Grand Jury room. Now, that made a rational trial plan."

A significant flaw in appellant's claim on appeal is that, in essence, he simply differs in hindsight with Mr. Sutter's trial strategy over the calling of witnesses. To begin with, at best, those witnesses would have testified that Mr. Graber did not personally solicit them to contribute one percent to the Town of Hempstead Republican Finance Committee while they were employed at the

Department of Conservation and Waterways. As Judge Dooling observed, while it was obvious to him as trier of the fact that there were such witnesses, their testimony, even if deemed to be relevant, did not constitute a defense to appellant's perjury before the grand jury (A. 480a). In any event it has been consistently held that a court may not grant relief for "[a]lleged tactical errors or mistakes in strategy. . ." *United States* v. *Garguilo*, 324 F.2d 795, 797 (2d Cir. 1963). Moreover, we submit that here there was no tactical error.

In response to appellant's allegation that his attorney "caused" his arrest, it should be noted that the record shows that government counsel advised Judge Dooling on August 31, 1976 that several witnesses who knew appellant had been advised that appellant did not intend to stand trial on that date (Transcript of Proceedings of August 31, 1976, p. 11).[13] In any event, subsequent to appellant's arrest, he and his attorney resolved their differences and affirmed their attorney-client relationship in open court on at least three occasions (See transcript of proceedings of September 2nd, page 23; September 7th, page 49; September 13th, page 458).

Appellant's allegation that his attorney refused to meet with him was a matter that was also aired and resolved by both men before trial. Prior to trial, Sutter acknowledged that he met with appellant on three occasions about the case. Additionally, a para-legal assistant in Sutter's office named James Frazier met appellant 10 to 12 times. On September 13, 1976, Sutter informed the court that he had conferred with appellant for fifteen

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[13] In a letter dated August 27, 1976, appellant wrote to Mr. Sutter, in part, as follows: "John, please do not miscalculate I will not go to trial on short notice; nor if I'm not fully aware of your strategy well in advance. Additionally, I insist on using my witnesses and they must be allowed to freely tell it like it was." (A. 453a).

hours about the case between September 8th and September 13th. The record shows that prior to trial, appellant and his counsel resolved their differences, formed an attorney-client relationship, and conferred continuously with each other throughout the course of the trial (transcript of proceeding of September 2, 1976, pp. 15, 27). And, as this Court has stated, "in evaluating claims of ineffective assistance of counsel it has long been the rule that 'time consumed in oral discussion and legal research is not the crucial test. . . The proof of the efficiency of such assistance lies in the character of the resultant proceedings. . .'" *United States* v. *Wojtowicz*, — F.2d — slip op. 1905, (2d Cir. February 22, 1977), quoting *United States* v. *Wight*, *supra*, 176 F.2d at 379. Here, as we have shown above, appellant *was* effectively represented at his trial.

Lastly, with regard to appellant's allegation that his counsel demeaned him in front of the court, it is enough to simply refer to Judge Dooling's comment (A. 475a-477a):

> "I thought that two things were being done with respect to the defense of this case. One was to make sharp and clear the legal point first. And, it was a two-fold legal point. First, that the answers that Mr. Graber gave were not solid answers before the Grand Jury and could not as a matter of law be the foundation of a perjury indictment. *Second, that as a—the transcript shows he was distraught. He is a man of a certain quality of nervous disability which doesn't impair his usefulness as a worker or anything else, but peculiarly unfits him either to be a Grand Jury witness or a trial court defendant. And that appeared, to some extent, from the transcript of the Grand Jury proceedings and in all depths at the trial, at every occasion counsel pressed on the attention of the Court the man's mental frailty—not a dis-*

abling frailty, but one peculiarly unfitting him to stand the rigors of testifying in Court, testifying before the Grand Jury. So that by the time Mr. Graber took the witness stand, I was supposed to take from his testimony what was good and discount to nervousness what was bad. That was a—the calculated part of this able lawyer's method of representing the defendant, that the seemingly derogatory remarks were attempted to [in] doctrinate me to believe—and I think that is reflected in these memoranda—believe that he was not equal to these legal cases (emphasis supplied).

Now, I do not think that it was a happy relationship of representation. It is perfectly plain to me that Mr. Graber was acutely unhappy with it. And it was perfectly plain to me that Mr. Sutter was in one half of his mind unable to understand Mr. Graber's inability to appreciate the method of representation that Mr. Sutter was using, and with the other side of his mind the determination to see to it that he had his way; that he managed the litigation for one simple reason, that he thought he knew more about managing litigation than Mr. Graber did. And perhaps he does."

In short, appellant's claim of ineffective assistance of counsel should be rejected.

POINT III

Appellant Waived His Right To A Jury Trial.

Appellant contends that prior to accepting his waiver of a jury trial, the court was required to determine that such waiver was made knowingly and voluntarily. On appeal, appellant also asserts that he did not validly waive his constitutional right to a jury trial.

Rule 23(a) of the Federal Rules of Criminal Procedure provides that a waiver of a jury trial must be "in writing with the approval of the court and the consent of the government." Rule 23(a) is satisfied when a defendant executes a written waiver in open court of the right to a jury trial. *Estrada* v. *United States*, 457 F.2d 255, 256-257 (7th Cir. 1972), *cert. denied*, 409 U.S. 858 (1972); *United States* v. *Cativiela*, 460 F.2d 192 (9th Cir. 1972); *United States* v. *Hunt*, 413 F.2d 983 (4th Cir. 1969). While Rule 23(a) insures that the defendant's consent to a waiver of a jury trial be in writing, the question as to whether or not such a waiver has been knowingly and voluntarily given depends upon the facts and circumstances of a particular case, including the background, experience and conduct of the accused. *Johnson* v. *Zerbst*, 304 U.S. 458 (1938).

The facts and circumstances surrounding this case reveal that appellant is a 56 year old married man with four children. He is active in a school board, civic associations and church affairs. For the past decade, he has held a position of high responsibility within the Department of Conservation and Waterways, culminating in his promotion to Deputy Commissioner. As indicated by letters which he wrote to his attorney and his remarks to Judge Dooling in open Court on September 1st and 2nd, he is a bright and articulate if not "high strung" person.

Prior to trial appellant unabashedly expressed his views about counsel, defense strategy and the status of his trial but never once did he indicate that he desired a jury trial. Indeed, the record is clear that both appellant and counsel opted to waive a jury trial and be tried by the court (pp. 465-527(a); pp. 564-576).

On August 31st, Mr. Sutter advised Judge Dooling that appellant had indicated to him the day before that he desired to waive a jury trial because both men had agreed that the case was a question of law rather than one in which the facts were in dispute (August 31st, 1976, p. 4).

On September 2nd, appellant and Sutter reaffirmed their decision to waive a jury trial in open court before Judge Dooling. However, the trial was adjourned and the jury waiver was not accepted by the court in view of appellant's physical condition on that day.[14] The trial was then adjourned until September 7th. On that day, both appellant's family physician and the court appointed physician certified appellant's physical and mental competency to stand trial. After five days rest, appellant and counsel came to court ready for trial. Appellant asked permission to address the court personally, and spoke to Judge Dooling as follows (A. 119a):

> "The Defendant: Your Honor, last week, as a result of perhaps experiencing the most traumatic event of my life, I guess I didn't have it all together. I do have an attorney-client relationship at this time. Mr. Sutter and myself had a few friendly chats, brief chats via telephone from my

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[14] On September 2, counsel advised the court that appellant was not physically able to stand trial that day. For that reason, Judge Dooling agreed to commence the trial on September 7th in Westbury.

home to Connecticut over the long holiday weekend. I think I understand things a little better now.

I would also like to say, which is an extension of the comments I seem to recall I made last Thursday, my respect for the flag I see to the right—and if we do not have law and respect for it, justice in our nation, we have nothing. If in any way the events of last week offended the Court, I am terribly sorry.

The Court: That's the least of your concerns. I am immune to offenses because I'm very conscious that it is no easy thing to stand trial in such a case as this. It's quite understandable.

All right, sir.

The Defendant: Thank you, your Honor." [15]

It was that same day, September 7th, that Sutter, in open court, in the presence of appellant, presented to Judge Dooling a written waiver of a jury trial signed by counsel for both sides and appellant. Sutter then moved the court to approve the waiver, which Judge Dooling did (transcript of proceedings of September 7th, 1976, p. 48).

At this point, one thing was clear to all in the courtroom. Appellant was of sound mind, articulate and in good spirits. He was acting voluntarily and knowingly. At this point, there was no reason for Judge Dooling to have any doubt whatsoever but that appellant firmly desired to waive a jury trial. The conclusion is inescapable. Appellant is a mature and intelligent man who after having conferred with counsel elected to be tried

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[15] Presumably, appellant's reference to the "most traumatic event of my life" was his arrest for failure to appear in court on August 31st.

by the judge alone. Appellant and counsel waived a jury trial because, understandably, they viewed the trial more in terms of legal issues than factual disputes. In short, appellant obtained what he sought—a scrupulously fair trial by an able and experienced trial judge. He waived the right to a jury trial knowingly and voluntarily. On appeal, for the first time, he cannot be heard to complain.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: Brooklyn, New York
March 14, 1977

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

ALVIN A. SCHALL,
JOHN L. CADEN,
Assistant United States Attorneys,
*Of Counsel.**

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* The United States Attorney's Office wishes to acknowledge the assistance of Thomas D. Sclafani in the preparation of this brief. Mr. Sclafani is a June 1976 graduate of Brooklyn Law School.

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STATE OF NEW YORK
COUNTY OF KINGS } ss
EASTERN DISTRICT OF NEW YORK

CAROLYN N. JOHNSON being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 17th day of March 19 77 he served ~~a~~ two copies of the within

BRIEF FOR THE APPELLEE

by placing the same in a properly postpaid franked envelope addressed to:

Cahn & Cahn, Esqs.
East
196 Main Street
P.O. Box 680
Huntington New York 11743

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ~~Montague Street~~ 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Carolyn N. Johnson
CAROLYN N. JOHNSON

Sworn to before me this
17th day of March 19 77

Sylvia E. Morris
SYLVIA E. MORRIS
Notary Public, State of New York
No. 24-4503861
Qualified in Kings County
Commission Expires March 30, 1977